Petition

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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DANIEL J. MURRAY,
d/b/a BIG SKY TOYOTA,

Petitioner,

vs.

TOYOTA MOTOR DISTRIBUTORS,
INC. AND TOYOTA MOTOR
SALES, U.S.A., INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Are vertically related parent and subsidiary corporations which perform separate functions capable of conspiring with one another for purposes of Section 1 of the Sherman Act?

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JURISDICTIONAL STATEMENT

Petitioner Daniel J. Murray asks this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered on January 7, 1982.

Petitioner respectfully submits that the Ninth Circuit followed a clearly erroneous legal standard in ordering a new trial on the issue of the capacity of the two vertically related corporate defendants to conspire with one another under Section 1 of the Sherman Act. This ruling is in direct conflict with the prior holdings of this Court as well as other circuit courts of appeal.

The decision of the Ninth Circuit which is appealed from is reported at 669 F.2d 1377 (9th Cir. 1982), and attached as Appendix A for reference. A petition for rehearing filed by petitioner was denied on February 8, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) for determination and relief as provided in 28 U.S.C. § 2106.

STATUTORY PROVISIONS

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations is declared to be illegal.

STATEMENT OF THE CASE

Proceedings Below

Petitioner commenced this action in the United States District Court for the District of Montana on July 20, 1977 following the termination of his Toyota dealership in Lewistown, Montana by the defendants Toyota Motor Distributors, Inc. ("TMD") and Toyota Motor Sales, U.S.A., Inc. ("TMS"). Petitioner alleged *inter alia* that the defendants had terminated his dealership pursuant to an unlawful contract, combination or conspiracy in unreasonable restraint of trade or commerce within the meaning of § 1 of the Sherman Act, 15 U.S.C. § 1. Jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331 and 1337 and under Section 4 of the Clayton Act, 15 U.S.C. § 15.

Following a trial of approximately three weeks, the jury returned special verdicts. The jury found in verdicts 8 and 9 that TMD and TMS had violated Section 1 of the Sherman Act by entering into a contract, combination or conspiracy with one another in unreasonable restraint of trade or commerce, pursuant to which petitioner was terminated as a Toyota dealer. (Appendix B). The District Court had instructed the jury that TMD and TMS were capable of conspiring with one another so

as to violate Section 1 of the Sherman Act.[1] The District Court declined to provide two separate instructions requested by the defendants, to the effect that if TMD and TMS were a single business entity they could not conspire among themselves to violate Section 1 of the Sherman Act.[2]

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[1] 1. A portion of the conspiracy instruction given read as follows:

> A contract, combination or conspiracy violative of Section 1 of the Sherman Act may exist between two separate corporations, such as the defendants TMS and TMD, even though the defendant TMD is a wholly-owned subsidiary of defendant TMS.
>
> • • •
>
> Any restraint of trade may result from a conspiracy among those who are affiliated or integrated under a common ownership as well as a conspiracy among those who are otherwise independent.

(RT, v. 14, pp. 108-09). The entire conspiracy instruction given is attached as Appendix C for reference.

[2] The requested instruction Nos. 72 and 107 read:

> If parent and subsidiary corporation, notwithstanding their separate corporate status, function essentially as a single business unit and did not compete, a claim of conspiracy and restraint of trade in violation of Section 1 of the Sherman Act must fail.
>
> (CR 98, p. 72; RT, v. 13, p. 90).
>
> Two or more corporations separately incorporated where the relationship between the two companies consists of more than the mere ownership of the subsidiary's stock, which are not in competition with one another, are a single business unit consisting of a single unified structure, are subject to the management and control of common individuals, officers and employees, and are separated only by the technicality of separate incorporation cannot conspire in violation of the Anti-Trust Laws.
>
> If you believe that the Defendants Toyota Motor Distributors, Inc. and Toyota Motor Sales, U.S.A., Inc., are in reality a single business entity or structure as above described then and in that event they cannot be found to have conspired between themselves in violation of the Anti-Trust Laws.
>
> (CR 98, p. 108; RT, v. 13, p. 99).

The Ninth Circuit vacated the judgment that the defendants had violated Section 1 of the Sherman Act, finding that the District Court erred by not submitting to the jury the question of whether TMD and TMS were a single economic "enterprise" or "unit" so as to be incapable of conspiring together in violation of the Sherman Act. (664 F.2d at 1379; Appendix A).

With respect to the verdict under Section 1 of the Sherman Act, defendants did not raise on appeal any issue concerning the sufficiency of the evidence to support the jury's findings that they did conspire with one another, that the conspiracy unreasonably restrained trade or commerce, and that petitioner's dealership was terminated pursuant to the conspiracy. Instead, defendants only appealed the issue of their legal capacity to conspire with one another.

Statement Of Material Facts

TMS is a California corporation engaged in the importation of new Toyota motor vehicles, parts and accessories from Japan into the United States. TMD is a separate California corporation engaged in the distribution of new Toyota motor vehicles, parts and accessories. (Excerpt of Record, pp. 96-97, ¶ 5b).

TMS as an importer sells the automobiles to various distributors, including TMD, who are assigned distribution responsibilities for different geographic locations in the United States. The stock of TMD is wholly owned by TMS, but the stock of other Toyota distributors is not. (RT, v. 11, pp. 10-11).

TMD and TMS are therefore legally separate corporations which perform separate functions as "distributor" and "importer" respectively.[3] TMD and TMS also act *independently* of

[3] In their reply brief filed with the Ninth Circuit, defendants said at page 12:

> In response thereto, plaintiff Murray contends that TMS and TMD have a separate corporate existence and perform separate functions. Appellee Brief, p. 18. Defendants have never contested these propositions, and in fact stipulated to them in the Pre-Trial Order filed in this case.

one another. In their Answer filed in this proceeding, these defendants pled as follows:

> Defendants allege that Toyota Motor Sales, U.S.A., Inc. and Toyota Motor Distributors, Inc. are each California corporations, *that each said corporation acts independently of the other* and that each of said corporations are not under the control of Toyota Motor Co., Lmtd., a Japanese corporation.

(Excerpt of Record, p. 14, ¶ III). (Emphasis added).

The testimony of TMD personnel at trial emphasized the independent role of TMD. The TMD Portland Region Manager agreed that TMD was separate from TMS, and then added: "It's an independent corporation." (RT, v. 4, p. 10). TMD's functions included the distribution of vehicles to dealers, sale of parts, assistance in service training and sales training, and assistance in profit analysis. (RT, v. 4, pp. 14-15). TMD had its own budget and staff of an estimated 500 employees to perform these fuctions. (*Id.*) TMD also had a Board of Directors separate from TMS. (Trial Exhibit 248).[4]

Petitioner commenced business as a Toyota dealer in Lewistown, Montana on November 10, 1970. From that date until December 31, 1973, petitioner operated under a dealership agreement with Midland Implement Company – an independent subdistibutor in which neither TMD nor TMS held an ownership interest. (Excerpt of Record, p. 97, ¶ 5c; RT, v. 9, pp.

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[4] TMD and TMS also held themselves out as separate and distinct corporations. In the standard Toyota dealership agreements, TMS was designated as the "IMPORTER" while TMD was designated as the "DISTRIBUTOR." (Trial Exhibits 39, 67). The responsibilities and obligations of TMS and TMD to the dealer were quite different and distinct under that agreement, with TMS assuming virtually none of the obligations. (*Id.*) Although separate signatures appeared on the agreements for both TMD and TMS, the latter defendant consistently took the position at trial that it was not one of the contracting parties. (RT, v. 1, p. 34; v. 7, pp. 113-14; v. 13, p. 63).

118-119). On January 1, 1974, TMD replaced Midland and continued as the distributor responsible for petitioner and other Montana dealers until petitioner was terminated on December 31, 1976. (Excerpt of Record, p. 98, ¶ 5j).

Petitioner contended at trial that he was terminated as a result of an anticompetitive market plan, initially devised by TMD for the purpose of eliminating petitioner and a number of other small dealers in Montana. Petitioner's evidence showed that pursuant to this plan, TMD representatives threatened that he would be terminated unless he expanded his facility to meet certain requirements. (RT, v. 2, pp. 194-95, 207-09). Yet these same representatives knew that the required facility expansion was not only unnecessary, but also financially unfeasible for petitioner. (Trial Exhibit 44; RT, v. 4, pp. 76, 102; v. 15, p. 54). TMD also knew that it would be essential for petitioner to sell makes of other new foreign automobiles in order to be able to afford to expand his facility. (RT, v. 15, p. 99). However, petitioner could not sell other new foreign cars because TMD rigidly enforced an exclusive dealing policy.[5] TMD also refused to provide petitioner with any guarantee that he would be allocated a sufficient number of Toyota cars to be able to afford to expand, while at the same time offering such a guarantee to other dealers. (RT, v. 4, pp. 89-91; v. 15, pp. 82-84).

The TMD Portland Region Manager who devised the marketing plan testified that this was his own procedure, and added: "I can't recall talking to anyone about it except my own staff." (RT, v. 15, pp. 30-31). The TMD Assistant Portland Region Manager testified that no approval for the plan was ever forthcoming from TMS. (RT, v. 4, p. 166). The TMD Portland Business Manager described the plan as an "in house" deal. (RT, v.

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[5] The Ninth Circuit affirmed a separate verdict for petitioner that defendants had engaged in exclusive dealing practices which were unlawful under Section 3 of the Clayton Act, 15 U.S.C. § 14. (See 664 F.2d at 1379, Appendix A).

9, p. 134; v. 10, p. 81).

It was petitioner's burden at trial to establish that TMS had in fact conspired with TMD in carrying out the anticompetitive objectives of the marketing plan which led to his termination. Petitioner satisfied this burden by showing, among other things, that TMS actively monitored the marketing plan as well as the exclusive dealing policy which TMD and other distributors enforced among dealers. (RT, v. 2, p. 230; v. 3, pp. 108, 113-114, 130-31; v. 12, pp. 23-25). Petitioner also showed that TMS participated in the final decision to terminate him, after the initial notice of termination had been given by TMD. (RT, v. 2, pp. 229-30; v. 3, pp. 108, 113-14, 130-31).

REASON FOR GRANTING THE WRIT

1. In Ruling That The Defendants May Constitute A Single Economic Enterprise So As To Be Incapable Of Conspiracy With One Another, The Ninth Circuit Has Adopted An Unworkable Standard That Has Been Expressly Rejected By This Court And Other Courts Of Appeal.

This case is unique in that resolution of the question of defendants' ability to conspire with one another will be dispositive of their liability under the Sherman Act for terminating petitioner's automobile dealership. The jury found, and it must be assumed for purposes of this appeal, that the defendants did in fact conspire together and that their conspiracy unreasonably restrained trade. The only issue defendants raised on their appeal from the Sherman Act verdict was their legal capacity as a "single economic enterprise" to conspire with one another.

The District Court instructed the jury that a conspiracy "may exist between two separate corporations, such as the defendants TMS and TMD . . . ." However, it remained for the jury to decide whether or not TMD and TMS did conspire with one another, and if so, whether an unreasonable restraint of trade

resulted.[6] By declining to grant defendants' requested instructions 72 and 107, the District Court refused only to permit these defendants to avail themselves of the defense that they could not legally conspire with one another if they were a "single economic enterprise."

The Ninth Circuit vacated the judgment, reasoning that the District Court erred in not permitting the jury to decide whether TMD and TMS were a single economic enterprise (or unit), so as to be legally incapable of conspiracy. (664 F.2d at 1379, Appendix A).

The Ninth Circuit standard will create a substantial and unwarranted additional barrier to recovery by plaintiffs who have been injured by anticompetitive conspiratorial activity. Those who choose to do business in separate corporate form and realize the advantages derived therefrom, must be held legally capable of contracting, combining or conspiring with one another. This has been the consistent teaching of the Court, and a writ of certiorari should issue to review the Ninth Circuit's decision.

A. The Ninth Circuit's Decision Is In Direct Conflict With The Decisions Of This Court.

There have been five antitrust cases in which this Court has directly considered the capacity of related corporations to conspire with one another, and in each this Court has rejected the single economic enterprise defense. See *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947); *Schine Chain Theatres v. Unites States*, 334 U.S. 110, 116 (1948); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951);

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[6] The District Court was careful to instruct the jury that "[t]he mere fact of corporate affiliation does not suffice to render dealings between subsidiaries or between a subsidiary and its parent eillegal." (RT, v. 14, p. 114). (See the complete conspirace instruction Appendix C).

Timken Roller Bearing Co. v. United States, 341 U.S. 593, 597-98 (1951); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-42 (1968).

In *Kiefer-Stewart, supra*, this Court rejected the assertion that the defendants' status as "mere instrumentalities of a single manufacturing-merchandising unit" precluded their ability to conspire. 340 U.S. at 215.

In *Perma Life Mufflers, supra*, the district court had found no evidence that the defendants "competed with each other or acted in any manner other than as a single integrated business." *See, Perma Life Mufflers, Inc. v. International Parts Corp.*, 376 F.2d 692, 699 (7th Cir. 1967). Finding that the defendants "were acting as a single business entity", the Seventh Circuit then held that they could not meet the conspiracy requirement of the Sherman Act. *Id.*

This Court granted certiorari in *Perma Life*,

> [b]ecause these rulings of the Court of Appeals seemed to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States,. . . .

392 U.S. at 136. This Court went on to reverse the Seventh Circuit, explicitly rejecting the single economic entity defense:

> There remains for consideration only the Court of Appeals' alternative holding that the Sherman Act claim should be dismissed because respondents were all part of a single business entity and were therefore entitled to cooperate without creating an illegal conspiracy. But since respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities.

392 U.S. at 141-42.

This Court has also rejected the single business entity argu-

ment when dealing with parent and subsidiary corporations in non-antitrust contexts. In *Schenley Distillers Corp. v. United States*, 326 U.S. 432 (1946), a subsidiary corporation tried to avoid a statutory permit requirement of the Interstate Commerce Commission. The subsidiary contended that its operations were performed for its parent, and that together they constituted one "commercial enterprise." This Court flatly refused to disregard the separate corporate status of the subsidiary:

> Appellant urges that we disregard the separate corporate entities which are to pay compensation to appellant for the transportation and treat the corporations controlled by appellant's parent as one single commercial enterprise. While corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose, they will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person. One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public.
>
> The fact that several corporations are used in carrying on one business does not relieve them of their several statutory obligations more than it relieves them of the taxes severally laid upon them.

326 U.S. at 436-37.

The adherence of the Ninth Circuit in the instant case to a "single economic enterprise" defense is directly contrary to this Court's holdings. The lower courts should not take it upon themselves to adopt a conspiracy standard which has been flatly

and repeatedly rejected by this Court. It will greatly undermine the ability of private litigants to enforce their rights under the antitrust laws if clear pronouncements of this Court are completely disregarded.

B. The Ninth Circuit's Decision Is In Direct Conflict With Other Appellate Decisions.

Application of the single economic enterprise standard to the facts of this case is not only an unwarranted departure from the clear holdings of this Court but also to the majority of holdings of the other courts of appeal. Most of the lower court decisions have, consistent with this Court's view in *Perma Life*, rejected the single economic entity defense.[7] Thus, there is a substantial

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[7] The Third Circuit has consistently held that a parent and subsidiary corporation are legally capable of conspiring with one another. In *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1345 (5th Cir. 1975) the Third Circuit held that Chrysler could conspire with factory owned dealerships. Citing this Court's opinions in *Perma Life* and *Kiefer-Stewart*, the Third Circuit explained:

> It is well settled that, although a party cannot combine or conspire with itself, a parent corporation, such as the defendants here, can combine or conspire with its wholly owned subsidiaries.

See also *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 33 (3d Cir. 1978), cert denied, 439 U.S. 876 (1978) (". . . the prerequisites of a conspiracy under § 1 are fulfilled by the presence of two or more legally distinct corporations."); *Cromar Co. v. Nuclear Materials & Equipment Corp.*, 543 F.2d 501, 512 (3d Cir. 1976) ("In *Perma Mufflers* the Supreme Court re-emphasized that when a parent and subsidiary avail 'themselves of the priviledge of doing busines through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entites'."); *Battle v. Liberty National Life Ins. Company*, 493 F.2d 39, 44 (5th Cir. 1974), cert denied, 419 U.S. 1110 (1975) ("Defendants argue, however, that because Liberty National and Brown-Service are one organization or business unit and not competitors, they are unable to form a combination or conspiracy within the meaning of § 1. We cannot agree."); *H&B Equipment Co., Inc. v. International Harvester*, 577 F.2d 239, 245 (5th Cir.

and direct conflict between the Ninth Circuit and other circuit courts on this issue. It is important that a writ of certiorari issue in this case to restore the primacy of this Court's holdings and eliminate the direct conflict which now exists.

C. The Ninth Circuit's Single Economic Enterprise Standard Is Unnecessary, Unworkable And Will Undermine Effective Enforcement Of The Antitrust Laws.

In *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 82 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970) the Ninth Circuit accurately cited several of this Court's decisions in support of the following statement:

> It is now settled law that if a corporation chooses to conduct parts of its business through subsidiary or affiliated

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1978) ("The parent's choice of form is important. Having availed itself of separate incorporation for Harco, International Harvester marked it off as a distinct entity, and the antitrust laws treat it as such."); *George R. Whitten, Jr., Inc., v. Paddick Pools Builders, Inc.*, 508 F.2d 547, 557 (1st Cir. 1974), cert. denied, 421 U.S. 1004 (1975) ("While the doctrine recognizing what we might call 'thin' conspiracies among corporations associated in one business has not been free of criticism, it seems alive and well."); *GTE Service Corporation v. F.C.C.*, 474 F.2d 724, 733 n. 14 (2d Cir. 1973) ("In the antitrust field, since Section 1 of the Sherman Act (15 U.S.C. § 1 (1970)) requires a contract, combination or conspiracy in restraint of trade, courts have carefully respected the separate corporate identity of parent and subsidiary in order to come within the multiparty requirement of the statute."); *Tamaron Distributing Corporation v. Weiner*, 418 F.2d 137, 139 (7th Cir. 1969) ("Under *Perma Life*, since Bronner and Weiner are separate legal entities, their agreement to violate the antitrust laws would be illegal."). The Seventh Circuit more recently held that Fotomat could not conspire with a wholly-owned subsidiary corporation which was not vertically related but was merely a service (photo processing) arm. See *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 727 (7th Cir. 1979), cert denied, 445 U.S. 917 (1980). The Eighth Circuit followed this holding in a companion case involving the same defendants. See *Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 590 (8th Cir. 1981).

> corporations and conspires with them to do something that independent entities cannot conspire to do under Section 1 of the Sherman Act, it is no defense that the corporations are, in reality a single economic entity. The Supreme Court has said that 'common ownership and control does not liberate corporations from the impact of the antitrust laws.'[8]

Notwithstanding the foregoing, in a series of subsequent cases, the Ninth Circuit has attempted to articulate a single economic enterprise standard. See *Knutson v. Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), cert. denied, 433 U.S. 910 (1977), *Mutual Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620 (9th Cir. 1977), *Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451 (9th Cir. 1979), *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614 (9th Cir. 1979), cert. denied, 447 U.S. 906 (1980). However, resolution of the conspiracy question presented in these cases did not require formulation of a single economic enterprise defense. In each case, the alleged conspiratorial conduct of the related defendant corporations was directed by a single common officer or owner. Under these circumstances, it could have been much more easily rationalized that there was no conspiracy because the single individual owner could not conspire with himself.[9]

Application of the Ninth Circuit standard will open a floodgate under which separate corporations accused of conspiracy may plead as a special defense that they were acting as part of a single economic enterprise. There are no realistic bounds to this

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[8] The portion of the district court's conspiracy instruction deemed improper by the Ninth Circuit in this case is almost a direct quote from the above holding.

[9] This was the rationale followed by the district court in *Knutson v. Daily Review, Inc., supra*, before it was appealed to the Ninth Circuit. See 383 F. Supp. 1346, 1358 (N.D. Ca. 1974).

defense. A "single economic enterprise" would seem to encompass all persons and firms working together toward any common economic end. Indeed, those firms who conspire together most frequently and effectively may be in the best position to argue that they have been acting as part of a single business enterprise.

This Court and most of the circuits have held without qualification that separate corporations may conspire with one another. This is a workable standard, and avoids the lengthy fact finding mission otherwise necessary to determine whether the corporations are working together as part of a single economic enterprise. This Court's standard has not been unduly harsh to the business community. Related corporations which conspire together must still be found to have achieved an anticompetitive end before the Sherman Act is violated. If related corporations must work closely together and do not wish to run the risk of conspiring with one another in violation of the Sherman Act, they need only refrain from concerted conduct which unreasonably restrains trade or commerce to the injury of others.[10]

To appreciate the problem petitioner and other antitrust litigants will face, this Court need only consider the Ninth Circuit's own words in *Mutual Fund Investors v. Putnam Management Co., supra:*

> The antitrust cases determining the existence or absence of any intraenterprise conspiracy, when taken collectively, resemble a thaumatrope. Rules seemingly clear on their

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[10] They may also choose to merge into one corporation. This is precisely what happened with the various houses of Seagram, which this Court found capable of conspiring with one another when they were separately incorporated. See *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., supra.* After that decision, the houses of Seagram were made divisions of a single corporation and subsequently were able to argue successfully that they could no longer conspire with one another. See *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., supra.*

> face become an unresolved conceptual blur when applied to the variant fact situations presented by diverse economic entities and functional structures.

553 F.2d at 625. The court then pointed out how it had earlier in *Knutson v. Daily Review, Inc., supra* "struggled with the underlying problem of defining an economic unit and the ancillary problem of determining the effect of a given corporate structure." *Id.*

A reading of *Knutson* illustrates the judicial morass which results from an attempt to formulate a single economic enterprise standard. After a lengthy and ambiguous discussion on the issue of whether separate but related corporations could or could not conspire, the court left the matter unresolved because there was no showing that the concerted action effected a horizontal restraint on trade. 548 F.2d at 801-03. *Knutson* and later decisions of the Ninth Circuit provide virtually no guidance to the trier of fact or lower courts. For example, the Ninth Circuit recently said that the test is whether the related corporations have "antitrust significance as separate economic units." See *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 652 F.2d 917, 958 (9th Cir. 1981). Yet there is no indication of how this standard is to be realistically explained to a jury, or what factors should be considered by a jury in determining whether the related corporations have "antitrust significance."

Sherman Act antitrust cases are already quite difficult, due to the elaborate factual and economic inquiry generally required to determine if there has been a conspiracy, whether that conspiracy has unreasonably restrained trade or commerce, and whether the plaintiff has been injured by the conspiracy. To superimpose the additional burden of determining whether or not related corporate defendants have "antitrust significance" or are a part of a "single economic enterprise" can only make Sherman Act cases even further complicated and more protracted.

Petitioner's case is a good example. After one lengthy jury trial and more than five years after having been terminated as a Toyota dealer, petitioner faces yet another lengthy jury trial on the nebulous single economic enterprise standard raised by the Ninth Circuit's ruling.

Congress purposefully used the words "contract, combination in the form of trust or otherwise, or conspiracy" without qualification and in the broadest sense. Consistent with that view, this Court has repeatedly held that separate corporations can contract, combine or conspire with one another, whether or not they are economically related.

Petitioner respectfully submits that the Ninth Circuit has taken it upon itself to create an added burden for antitrust plaintiffs which is unnecessary, unwarranted and unworkable.

CONCLUSION

For the above reasons, petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

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Appendix

APPENDIX A

Daniel J. MURRAY, d/b/a Big Sky Toyota, Plaintiff-Appellee,

v.

TOYOTA MOTOR DISTRIBUTORS, INC., and Toyota Motor Sales, U.S.A., Inc., Corporations, Defendants-Appellants.

Nos. 80-3271 to 80-3273.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Oct. 8, 1981.

Decided Jan. 7, 1982.

Appeal from the United States District Court for the District of Montana.

Before BROWNING, Chief Judge, WRIGHT, Circuit Judge, and WEIGEL,* District Judge.

PER CURIAM:

Toyota Motor Distributors, Inc. (TMD) and Toyota Motor Sales, U.S.A., Inc. (TMS), respectively distributor and importer of Toyota automobiles in the United States, terminated the Lewistown, Montana, Toyota dealership of Appellee Daniel Murray. Murray brought this suit. TMD and TMS appeal from a judgment entered on a special jury verdict for violations of sections 1 and 2 of the Sherman Act, section 3 of the Clayton Act, and the Automobile Dealers' Day in Court Act. Midland Implement Co., a subdistributor for TMD during part of the time at issue, was not a defendant but was found by the jury to have been a co-conspirator.

1. Single Economic Enterprise

[1, 2] Affiliated corporations that are in substance "a single

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* Honorable Stanley A. Weigel, District Judge, United States District Court for the Northern District of California, sitting by designation.

business unit separated only by the technicality of separate incorporation," are incapable of conspiring under section 1 of the Sherman Act. *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 802 (9th Cir. 1976). Although "common ownership and control does not liberate corporations from the impact of the antitrust laws," *Kiefer-Steward Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215, 71 S.Ct. 259, 261, 95 L.Ed. 219 (1951), "the mere formality of separate incorporation is not, without more, sufficient to provide the capability for conspiracy." *Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 456 (9th Cir. 1979). "In general, affiliated corporations cannot conspire with each other where they function as a single economic unit." *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 927 n.5 (9th Cir. 1980).

[3] TMD and TMS contended they were incapable of conspiring with one another because they are a single economic enterprise. Murray contended the contrary. The district court instructed the jury that TMD and TMS were capable of conspiracy as a matter of law.[1] Although sufficient evidence existed for a properly instructed jury to conclude TMS and TMD were not a single economic unit and therefore were capable of conspiracy, sufficient evidence also existed to allow the jury to conclude the contrary. The instruction given, which effectively took this issue from the jury, was improper. The portion of the judgment relating to violations of §1 of the Sherman Act at times when Midland Implement Co. was not a co-conspirator must be vacated.

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[1]. The instruction read:

> A contract, combination or conspiracy violative of Section 1 of the Sherman Act may exist between separate corporations, such as the defendants TMS and TMD, even though the defendant TMS is a wholly-owned subsidiary of the defendant TMS. Any restraint of trade may result from a conspiracy among those who are affiliated or integrated under a common onwership as well as a conspiracy among those who are otherwise independent.

2. Sufficiency of Evidence of Exclusive Dealing

[4] There was sufficient evidence from which the jury could find that Murray was prevented from selling other lines of new cars. The jury reasonably could have believed TMD had an exclusive dealing policy and, but for this policy, Murray would have sought and obtained another dealership.

3. Definition of Manufacturer

TMD and TMS contend the Dealer's Day Act does not apply to them because they are not automobile "manufacturers" to whom alone the Act applies. The act defines "manufacturers" to include any "corporation which acts for and is under the control of" a manufacturer of automobiles. 15 U.S.C. § 1221. The district court directed a verdict for Murray on the issue of control.

[5] The evidence in the record was sufficient to permit a jury to find that TMS and TMD were controlled by Toyota Motor Company. It was not, however, sufficient to preclude the jury from finding otherwise. *Marquis v. Chrysler Corp.*, 577 F.2d 624 (9th Cir. 1978), is inapposite; in that case control by the manufacturer was "undisputed." *Id.* at 629. The judgment in *Sunrise Toyota, Ltd. v. Toyota Motor Co.*, 55 F.R.D. 519 (S.D.N.Y 1972) did not estop TMS and TMD on the issue of control; that case dealt with a different period of time, and Murray did not show the material facts were unchanged in the interim. It was error to direct a verdict for Murray.

4. Testimony of Former TMD Employee John Garrett

[6] The deposition testimony of Garrett that TMD had a policy of seeking to enforce exclusive dealing clauses, taken in connection with a suit brought against TMD and TMS in Arizona, was properly admitted under Fed.R.Evid. 804(b)(1). TMD and TMS had a "similar motive" in that case and this to cross-examine Garrett as to the existence of the policy even though his responsibilities at TMD involved Arizona, Nevada, Texas, and parts of California rather than Montana. The motive need only be "similar," not identical. There is nothing to

suggest that TMD's policy in this respect, if it existed, would not have extended to Montana.

Although TMD and TMS argue they did not enforce exclusive dealing requirements in sparsely populated areas, we can take judicial notice that large areas of Nevada, New Mexico, and Texas are as sparsely populated as Montana. Finally, Garrett resided in California, beyond the reach of a subpoena from the district court in Montana, and was therefore "unavailable" within the meaning of Fed.R.Evid. 804(a).

5. Testimony of Mr. Frank

[7] TMD and TMS contend the district court erred in striking part of the testimony of their expert witness, Mr. Frank, because he was not qualified to criticize the methodology of Murray's second expert witness. Appellants misstate the district court's ruling. The court was "not challening Mr. Frank's qualification," RT v. 13, p. 56, but rather granted the motion to strike for lack of proper foundation. Mr. Frank was permitted to criticize the methodology of Murray's first expert on redirect examination, RT v. 13, pp. 45-47, because appellee's counsel asked about it on cross-examination. RT v. 13, pp. 18-20, 24, 40-41. However, the methodology of Murray's second expert was not addressed during cross. "The practice is uniform that [redirect examination] is normally limited to answering any new matter drawn out in the next previous examination." McCormick, *Evidence*, § 32. The scope of redirect examination is entrusted to the district court's discretion. *United States v. Lopez*, 575 F.2d 681, 686 (9th Cir. 1978). There was no abuse of discretion here.

6. Allegedly Inconsistent Verdict

[8] TMD and TMS contend that the jury's special verdict was prejudicially inconsistent because the jury found Murray had not participated in a conspiracy to sell only Toyota automobiles in violation of § 1 of the Sherman Act, but also found TMD and TMS had sold Toyota cars to Murray "on the condition, agreement or understanding" that he not sell other brands of cars, in violation of § 3 of the Clayton Act. 15 U.S.C. § 14.

The verdicts are not inconsistent. The jury could have found TMS and TMD had imposed the exclusive dealing condition on Murray unilaterally, and that submission to such a condition did not amount to participation by Murray in the conspiracy.

7. **Excessive Damages**

[9] Contrary to the district court's instructions, the jury awarded Murray more in damages for the period after his dealership was terminated than Murray sought in his complaint. Such an award cannot stand. 6A Moore's Federal Practice ¶59.08 [4] at 59-139. Remittitur would be appropriate if there were "no genuine issue of fact as to the amount of recoverable damages," *Id.*, ¶59-08.[4] at 59-140, but since the amount of post-termination damages was contested, a new trial on this issue is necessary.

Conclusion

The judgment is affirmed insofar as it rests upon violation of §3 of the Clayton Act and of §1 of the Sherman Act while Midland Implement Co. was a co-conspirator. The remainder of the judgment is VACATED and REMANDED for further proceedings consistent with this opinion. The award of attorneys' fees is VACATED and REMANDED for the district court's reconsideration after proceedings on remand.

APPENDIX B

SPECIAL VERDICT

1. Did either Defendants TMD or TMS, or both, violate the Dealer's Day in Court Act by failing to act in good faith in terminating plaintiff's Toyota franchise?

TMD	Yes ✓	No ____
TMS	Yes ✓	No ____

2. If your answer to No. 1 is yes as to either defendant, what amount of damages, if any, did plaintiff sustain as a result of the termination of his Toyota franchise from January 1, 1977, to December 31, 1981?

$273,307

3. Did either Defendants TMD or TMS, or both, violate Section 3 of the Clayton Act by selling Toyota vehicles to plaintiff on the condition, agreement or understanding that he not sell the vehicles of another foreign vehicle manufacturer, where the effect of such arrangement may have been to substantially lessen competition in a relevant market area?

TMD	Yes ✓	No ____
TMS	Yes ✓	No ____

4. If your answer to No. 3 is yes as to either defendant, what amount of damages, if any, did plaintiff sustain as a result of his inability to sell an additional line or lines of foreign vehicle from July 1, 1973, to December 31, 1976?

$32,535

5. Did either Defendants TMD or TMS, or both, violate Section 1 of the Sherman Act by entering into a contract, combination or conspiracy in unreasonable restraint of trade or commerce, pursuant to which plaintiff was prevented from selling the vehicles of another foreign manufacturer?

TMD	Yes ✓	No ____
TMS	Yes ✓	No ____

APPENDIX B

6. If your answer to No. 5 is yes, was the contract, combination or conspiracy between:

A. TMS and TMD — Yes ✓ — No ____

B. TMS and/or TMD and plaintiff — Yes ____ — No ✓

C. TMS and/or TMD and Midland Implement Company — Yes ✓ — No ____

7. If your answer to No. 5 is yes as to either defendant, what amount of damages, if any, did plaintiff sustain as a result of his inability to sell an additional line or lines of foreign vehicle from July 1, 1973, to December 31, 1976?

$32,535.00

8. Did either defendant TMD or TMS, or both, violate Section 1 of the Sherman Act by entering into a contract, combination or conspiracy in unreasonable restraint of trade of commerce, pursuant to which plaintiff was terminated as a Toyota dealer?

TMD — Yes ✓ — No ____

TMS — Yes ✓ — No ____

9. If your answer to No. 8 is yes, was the contract, combination or conspiracy between:

A. TMS and TMD — Yes ✓ — No ____

B. TMS and/or TMD and Datsun and/or Volkswagen — Yes ____ — No ✓

10. If your answer to No. 8 is yes as to either defendant, what amount of damages, if any, did plaintiff sustain as a result of the termination of his Toyota franchise from January 1, 1977, to December 31, 1981?

$273,307

APPENDIX C

Excerpt From Jury Instructions
(RT, v. 14, pp. 107-114)

A conspiracy is a combination of two or more persons, by concerted action to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means.

So, a conspiracy is a kind of partnership, in which each member becomes the agent of every other member. The essence of a conspiracy is a combination or agreement to violate or to disregard the law.

Mere similarity of conduct among various persons, and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.

However, the evidence in the case need not show that the members entered into any express or formal agreement, or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be accomplished.

What a preponderance of the evidence in the case must show, in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.

The evidence in the case need not show that all the means or methods set forth in Mr. Murray's complaint were agreed upon to carry out the alleged conspiracy; nor that all the means and methods which were agreed upon were actually used or put into operation; nor that all persons alleged to have been members of the claimed conspiracy were such.

What a preponderance of the evidence in the case must show is that the alleged conspiracy was formed; that one or more of the means or methods described in the complaint was agreed upon to be used in an effort to effect or accomplish some object or purpose of the conspiracy alleged in Mr. Murray's complaint; and that two or more persons, including one or more of the defendants, were knowingly members of the conspiracy alleged in the complaint.

APPENDIX C

A contract, combination or conspiracy violative of Section 1 of the Sherman Act may exist between two separate corporations, such as the defendants TMS and TMD, even though the defendant TMD is a wholly-owned subsidiary of defendant TMS.

Any restraint of trade resulting from a conspiracy among those who are affiliated or integrated under common ownership as well as from a conspiracy among those who are otherwise independent – let me read that again.

Any restraint of trade may result from a conspiracy among those who are affiliated or integrated under a common ownership as well as a conspiracy among those who are otherwise independent.

A contract, combination or conspiracy violative of Section 1 of the Sherman Act may also exist between defendants, or either of them, and a dealer, such as Mr. Murray. If a dealer is required to acquiesce in the supplier's demand, a contract, combination or conspiracy in restraint may be formed in violation of the Sherman Act.

A contract, combination or conspiracy may also be formed between competitors, such as either of the defendants and other suppliers of new imported automobiles, which unreasonably restrained trade in violation of the Sherman Act. In this suit the plaintiff alleges that TMD and TMS conspired with one another or one or more persons named as co-conspirators. There can be no conspiracy unless more than one person is involved.

The very word "conspiracy" means "together with." But it may be that not all persons charged with being conspirators are conspirators. It may be that none of them is a conspirator.

In order to succeed, the plaintiff does not have to show you that every one of the named defendants and named co-conspirators joined in the conspiracy, but plaintiff does have to show that at least one of these named defendants conspired with at least one other named defendants or co-conspirators.

You are also instructed that there cannot be a conspiracy to violate the antitrust laws in this case unless you find that one of the defendants is a party to the alleged conspiracy.

It is not necessary for Mr. Murray to join as defendants in

this case all persons who may have participated with the defendants in the alleged combination.

A person injured by such a combination may recover against one or all of those participating, and he may enforce his right of recovery against one, or some, or all, at his election.

So you are hereby instructed that it is immaterial, as a matter of law, that any other members of the combination may have not been joined in this suit by Mr. Murray.

The acts done by one or more of the several defendants and parties named as co-conspirators were lawful acts if not done as a result of and pursuant to an unlawful contract, combination or conspiracy.

In determining whether or not such a conspiracy existed between one or more of the defendants and one or more of the other defendants or those named as co-conspirators to refuse to deal with Mr. Murray, you may consider the validity of the reasons which such parties have ascribed for any refusal to deal with Mr. Murray, and if those reasons seem to you not to be advanced in good faith, and if they appear to you to be not the real reason for any refusal of such parties to deal with Mr. Murray, then these are circumstances which you may take into consideration in determining whether any refusal to deal with Mr. Murray was the result of and in pursuance of a conspiracy not to deal with Mr. Murray.

On the other hand, these acts may appear to you to be reasonably responsive to business considerations and not in pursuance of a conspiracy. The question then is what the intent was of the defendants and those named as co-conspirators, and whether or not they acted in an agreement pursuant to a conspiracy to refuse to deal with Mr. Murray.

* * *

As a general rule, when any person is really capable – whatever any person is legally capable of doing himself can be done through another as agent. So, if the acts of an employee or other agent are voluntarily and intentionally ordered or directed, or authorized or consented to by a person, then the law holds that person responsible for such acts, the same as if the acts had been done by such person.

A corporation is in law a person, but of course it cannot act

otherwise than through its directors, or officers, or employees, or other agents.

The law therefore holds a corporation responsible for all unlawful acts of its directors, or officers, or employees, or other agents, provided such unlawful acts are done within the scope of their authority, as would usually be the case if done in the ordinary course of their employment, or in the ordinary course of the corporation's business.

Authority to act for a corporation in a particular matter, or in a particular way or manner, may be inferred from the surrounding facts and circumstances shown by the evidence in the case.

That is to say, authority to act for a corporation, like any other fact in issue in a civil case, need not be established by direct evidence, but may be established by indirect or circumstantial evidence.

Every act of every director, or officer, or employee, or other agent, on behalf of, or in the name of a corporation, if done within the scope of his authority, is in law the act of the corporation itself.

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy.

On the other hand, a person who has no knowledge of a conspiracy, but who happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator.

Before the jury may find that a defendant or any other person, has become a member of a conspiracy, a preponderance of the evidence in the case must show that the conspiracy was knowingly formed, and that the defendant, or other person who is claimed to have been a member, knowingly participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

To act or participate knowingly means to act or participate voluntarily and intentionally, and not because of mistake, or accident, or other innocent reason.

So, if a defendant, or any other person, with understanding of the unlawful character of a plan, intentionally encourages, advises, or assists, for the purpose of furthering the undertaking

or scheme, he thereby becomes a knowing participant – a conspirator.

One who knowingly joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

In determining whether or not a defendant, or any other person, was a member of a conspiracy, the jury is not to consider what others may have said or done. That is to say, the membership of a defendant, or any other person, in a conspiracy must be established by evidence in the case as to his own conduct, by what he himself knowingly said or did.

The mere fact of corporate affiliation does not suffice to render dealings between subsidiaries or between a subsidiary and its parent illegal.

Opposition

FILED
MAY 20 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1842

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DANIEL J. MURRAY,
d/b/a Big Sky Toyota,

Petitioner,

vs.

TOYOTA MOTOR DISTRIBUTORS, INC. AND
TOYOTA MOTOR SALES, U.S.A., INC.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are separately incorporated parent and wholly-owned subsidiary corporations capable of fulfilling the plurality of actors requirement of Section 1 of the Sherman Act even if they constitute a single economic entity?

PARTIES TO THE PROCEEDING

Respondents Toyota Motor Sales, U.S.A., Inc. and Toyota Motor Distributors, Inc. were appellants below. Petitioner Daniel J. Murray d/b/a Big Sky Toyota was the appellee below.

Toyota Motor Sales, U.S.A., Inc. is owned by two Japanese corporations, Toyota Motor Company, Ltd. and Toyota Motor Sales Company, Ltd. Each of the Japanese corporations owns 50% of Toyota Motor Sales, U.S.A., Inc.

Toyota Motor Distributors, Inc. owns two subsidiaries, Toyota Motor Manufacturers, U.S.A., Inc. and Vehicle Processors, Inc.

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IN THE

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OCTOBER TERM, 1981

DANIEL J. MURRAY,
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vs.

TOYOTA MOTOR DISTRIBUTORS, INC. AND
TOYOTA MOTOR SALES, U.S.A., INC.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondents Toyota Motor Sales, U.S.A., Inc. (TMS) and Toyota Motor Distributors, Inc. (TMD) adopt that portion of the statement of the case submitted by petitioner Daniel J. Murray (Murray) herein which describes the proceedings below.

Defendants submit, however, that petitioner's "statement of material facts" incorrectly describes the functional relationship of TMS and TMD elicited at trial in the district court below. Respondents refrain herein from discussing the functional relationship of TMS and TMD since it is not relevant to the "question presented" to this Court.

Petitioner has submitted the "question presented" as follows:

> Are vertically related parent and subsidiary corporations which perform separate functions capable of conspiring with one another for purposes of Section 1 of the Sherman Act.

Respondents believe that that statement of the question presented is infirm, since the Ninth Circuit opinion appealed from would answer such question in the following manner: it would depend on whether or not the parent and subsidiary corporations constituted a single economic entity. Hence, answering the question presented by petitioner sheds no light on the correctness of the decision of the Ninth Circuit from which petitioner appeals herein.

The "question presented" to this Court is properly articulated as follows:

> Are separately incorporated parent and wholly-owned subsidiary corporations capable of fulfilling the plurality of actors requirement of Section 1 of the Sherman Act even if they constitute a single economic entity.

The issue as thus articulated is the issue really addressed by petitioner in his brief.

Respondents submit that, even as properly articulated, the question presented should not give rise to the issuance of a writ of certiorari for the following reasons:

1. the decision appealed from is in harmony with previous pronouncements of this Court;

2. this Court's consideration of the issue would be premature since the Ninth Circuit has vacated and remanded to the district court the issue of whether or not TMS and TMD are in fact a single economic entity;

3. the conflict among the circuits has not ripened since a number of circuits have not yet addressed the issue, leaving open the possibility of an emerging consensus; and

4. the Ninth Circuit's series of decisions on the issue have provided a workable, effective formula whereby Section 1 of Sherman Act is given its intended effect.

REASONS FOR DENYING THE WRIT

1. THE NINTH CIRCUIT OPINION APPEALED FROM HEREIN IS NOT IN CONFLICT WITH ANY PRIOR DECISION OF THIS COURT.

Contrary to the assertions of petitioner herein (*Petitioner Brief*, p. 8), this Court has never rejected the single economic entity analysis for determining whether the plurality of actors requirement of Section 1 of the Sherman Act has been fulfilled. The series of Supreme Court decisions upon which petitioner purports to reply establishes only that mere common ownership of separately incorporated entities does not insulate those entities from the impact of Section 1 of the Sherman Act. Petitioner incorrectly equates the resolution of that issue with the resolution of the single economic entity issue which he hopes to bring before this Court herein.

In reality, the Supreme Court determination that common ownership does not insulate two corporations from a finding of conspiracy pursuant to Section 1 of the Sherman Act is decidedly different from a determination that two corporations which act as a single economic entity are not insulated from a finding of conspiracy pursuant to Section 1 of the Sherman Act. The former determination has been made by this Court, while the latter quite clearly has not.

A review of the Supreme Court cases in question supports this position. The first in a series of Supreme Court cases upon which petitioner purports to rely is *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947). In that case, the United States sued horizontally and vertically related corporate entities, charging them with a combination or conspiracy to restrain and monopolize trade in (1) the sale of motor vehicles for use as taxicabs,

and (2) the business of furnishing cab services. The *Yellow Cab* defendants did not, and could not, allege that they constituted a single economic entity since among their enterprises were companies which either competed or purported to compete with one another in the supply of taxicab services. *See discussion,* 332 U. S. at 221-23, 227.

In order to understand the precise holdings of those Supreme Court cases upon which petitioner purports to rely, it is important to understand the effect of the presence of competition or apparent competition between the related corporations in question. The presence of competition or apparent competition between distinct corporate entities precludes the argument that they constitute a single economic entity. *See United States* v. *Citizens & Southern National Bank,* 422 U. S. 86, 116-17 (1975). It would be, at the very least, anomalous if two corporations could constitute two market forces by competing with each other for market shares and monetary rewards, yet argue that they constitute only one economic entity. This Court has precluded such an argument in the *Citizens & Southern National Bank* case. In contrast, however, the presence or absence of competition between related entities has absolutely no bearing on a contention that mere common ownership should insulate related corporations from the plurality of actors requirement of Section 1 of the Sherman Act.

As has been previously stated, the defendants in *Yellow Cab* did not, and could not, allege that they constituted a single economic entity since various of their companies competed or purported to compete in the supply of taxicab services. Rather, they argued that common ownership of affiliated or integrated companies insulated those companies from a finding of conspiracy pursuant to Section 1 of the Sherman Act. This Court found defendants' arguments to be unpersuasive, but never addressed the issue of whether two corporations which act as a single economic entity should be insulated from a finding of conspiracy pursuant to Section 1 of the Sherman Act.

In fact, the only portion of the *Yellow Cab* case directly applicable to the instant petition directly contradicts petitioner's contentions here. In *Yellow Cab*, this Court stated that:

> [t]he corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form. 332 U. S. at 227.

Petitioner argues that this Court should find that TMS and TMD may conspire in violation of Section 1 of the Sherman Act simply because they chose the form of separate incorporation in carrying on their business. Such a finding by this Court would make the corporate interrelationships determinative of the applicability of the Sherman Act, contrary to the dictates of *Yellow Cab*.

The next Supreme Court case upon which petitioner purports to rely is *Schine Chain Theatres, Inc.* v. *United States*, 334 U. S. 110 (1948). There is nothing in the opinion in that case to indicate that the single economic entity question was considered by this Court. The defendants in that case consisted of a parent company, three of its officers and directors, and five of its wholly owned subsidiaries. The defendants contended that they were incapable of fulfilling the plurality of actors requirement of Section 1 of the Sherman Act because they were "closely affiliated rather than independent." 334 U. S. at 116. This Court rejected their argument, citing *Yellow Cab*, but giving no support to petitioner's contention that the Supreme Court had rejected the single economic entity defense.

In *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951), this Court granted certiorari in order to address an issue not relevant to the instant petition in any way,[1] but cited *Yellow Cab* in rejecting a defense raised by respond-

[1] In *Kiefer-Stewart*, the Supreme Court granted certiorari in order to determine whether an agreement among defendants to fix *maximum* resale prices violated the Sherman Act. 340 U. S. at 212-13.

ents to the effect that their status as mere instrumentalities of a single manufacturing-merchandising unit made it impossible for them to conspire in violation of Section 1 of the Sherman Act. As in *Yellow Cab*, the defendants in *Kiefer-Stewart* could not claim to be a single economic entity since they competed with each other. *See discussion, supra,* p. 4. In a different factual setting, this Court reached precisely the same conclusion in *Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593 (1951). In that case, defendants were also in actual or apparent competition with one another and hence could not avail themselves of the single economic entity defense.

Similarly, in *Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U. S. 134 (1968), this Court affirmed its earlier *Yellow Cab* decision and held the defendants had the capacity to conspire, stating that "the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities." *Id.* at 141-42. Because the series of judicial opinions in *Perma Life* do not concisely state whether or not the defendants competed with one another, it is unclear as to whether the defendants in *Perma Life* could have availed themselves of the single economic entity defense. *See* discussion, *supra* p. 4. Petitioner Murray argues that the defendants in *Perma Life* did not compete and hence implicitly availed themselves of the single economic entity defense. In support of that proposition, petitioner relies on a statement in the circuit court opinion, quoting the district court opinion, to the effect that:

> There is no evidence, except in plaintiffs' unsupported arguments that these corporations competed with each other or acted in any manner other than as a single integrated business. 376 F.2d 692, 699 (7th Cir. 1967).

Petitioner Murray's attempt, however, to turn this Court's *Perma Life* opinion into an opinion which rejected the single economic entity defense is simply incorrect. It is unclear from this Court's opinion in *Perma Life* whether this Court believed

that the defendants did not compete, or whether the Court believed that defendants competed, or at least held themselves out as competitors. *See* discussion in *Handler, Through the Anti-Trust Looking Glass—Twenty first Annual Anti-Trust Review,* 57 Cal. L. Rev. 182, 183-85 (1969). Hence, petitioner Murray is attempting to attribute new meaning to this Court's *Perma Life* decision predicated upon an apparent factual determination made by the lower courts, which determination was not adopted by this Court. It is apparent that this Court's *Perma Life* decision cannot be relied upon as support for the proposition advanced by petitioner herein.[2]

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[2] Indeed, petitioner's interpretation of this Court's *Perma Life* decision is further belied by a decision of this Court which preceded *Perma Life* by a scant six years. In *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U. S. 19 (1962), this Court declined to find a conspiracy among Sunkist, its wholly-owned subsidiary Exchange Orange, and another related entity, each of which belonged to the Sunkist organization. This Court stated:

> We are squarely presented, then, with the question of whether Sunkist, Exchange Orange, and Exchange Lemon—the three legal entities formed by these 12,000 growers—can be considered independent parties for the purposes of the conspiracy provisions of §§ 1 and 2 of the Sherman Act. We conclude not. . . .
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> • • • • •
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> . . . [W]e feel that the 12,000 growers here involved are in practical effect and in the contemplation of the statutes one "organization" or "association" even though they have formally organized themselves into three separate legal entities.
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> • • • • •
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> There is no indication that the use of separate corporations had economic significance in itself or that outsiders considered and dealt with the three entities as independent organizations. 370 at 29.

Although the *Sunkist Growers, Inc.* opinion of this Court directly contradicts the interpretation which petitioner would give *Perma Life* and its precedessors, this Court never discussed *Sunkist Growers, Inc.* in its *Perma-Life* opinion. Respondents suggest that that is powerful evidence against the *Perma Life* interpretation endorsed by petitioner.

Irrespective of the factual setting before it, it is clear that this Court in *Perma Life* determined not to go beyond its previous pronouncements in *Yellow Cab* and the succeeding cases, by using virtually the same language as appears in *Yellow Cab*. This Court stated that:

> since respondents . . . availed themselves of the privilege of doing business through separate corporations, *the fact of common ownership* could not save them from any of the obligations that the law imposes on separate entities. 392 U. S. at 141-42 (emphasis added).

As has previously been stated, respondents TMS and TMD *do not contend and have never contended,* that the fact of their common ownership should insulate them from a finding of conspiracy pursuant to Section 1 of the Sherman Act. Rather, respondents TMS and TMD contend that they are insulated from a finding of conspiracy pursuant to Section 1 of the Sherman Act by virtue of the fact that they constitute a single economic entity. This Court's *Perma Life* decision simply does not address that issue.[3]

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[3] Petitioner's attempt to rely on *Schenley Distillers Corp.* v. *United States,* 326 U. S. 432 (1946), a non-antitrust case, also is inapposite. As is apparent from even a cursory review of the *Schenley* case, it was brought pursuant to a different act with purposes not even remotely related to the preservation of competition—the main thrust of Section 1 of the Sherman Act.

In *Schenley,* this Court considered whether or not the appellant, a wholly owned subsidiary, should be considered a "private" or a "contract" carrier pursuant to the Interstate Commerce Act. If determined to be a private carrier, appellant would not have had to obtain a permit and would not be subject to criminal proceedings. Before the Interstate Commerce Commission and in subsequent judicial proceedings, appellant argued that it should be considered a private carrier since its operations were to be performed solely for its parent or for other corporations owned or controlled by the parent. 326 U. S. at 436. The Commission found, however, that the

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It is hence apparent that petitioner's contentions that the Ninth Circuit's decision is in direct conflict with prior decisions of this Court is in error, and thus does not give rise to the issuance of a writ of certiorari herein.

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transportation was to be "for compensation" from appellant's parent and the other corporations controlled by the parent, and hence, that appellant was not a "private" carrier. Appellant argued that the separate corporate entities should be treated as a single commercial enterprise, leading to the conclusion that it constituted a private carrier. This Court stated that:

> [corporate entities] will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages and *where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person* (emphasis added).

Petitioner Murray's implicit contention is that respondents have (1) advocated ignoring the existence of corporate entities, (2) to secure its advantages, (3) doing violence to the legislative purpose.

In fact, respondents have never contended that their separate corporate status should be ignored—rather that such status should not automatically render a single economic entity subject to the conspiracy requirements of the antitrust laws. While one might assume that respondents have assumed a separate corporate form to secure some advantages, petitioner has neither demonstrated that such advantages are present, nor that they would be inappropriate. Finally, and most importantly, petitioner has not demonstrated that respondents' contentions herein would do violence to the legislative purpose of the Sherman Act. In fact, petitioner has scrupulously avoided any discussion of the legislative purpose of Section 1 of the Sherman Act since it is petitioner's position that would do it violence, as interpreted by virtually all scholarly commentators. *See*, p. 11, *infra*.

2. THE CONFLICT AMONG THE CIRCUITS SHOULD NOT GIVE RISE TO A WRIT OF CERTIORARI.

A. The Decision Appealed From Is Not Ripe.

The Ninth Circuit Court of Appeals determined that the District Court erroneously instructed the jury that TMS and TMD were capable of fulfilling the plurality of actors requirement of Section 1 of the Sherman Act simply because they were separately incorporated, irrespective of whether or not they constituted a single economic entity. The Ninth Circuit made no determination as to whether or not TMS and TMD constituted a single economic entity, vacating and remanding the case to the district court in order to make that determination.

If on remand the trier of fact were to find that TMS and TMD do not constitute a single economic entity, then it would be clear under the current law of the Ninth Circuit that TMS and TMD could fulfill the plurality of actors requirement of Section 1 of the Sherman Act, and that this Court need not address the issue upon which the issuance of a writ of certiorari is premised. By seeking a writ of certiorari—prior to proceedings on remand—petitioner is asking this Court to consider an issue before it is ripe.

The lack of finality of the decisions of the lower courts has been a frequent reason for the denial of a writ of certiorari. As this Court stated in *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U. S. 327, 328 (1967), "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." In *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251, 259 (1916), this Court noted that the lack of finality furnished sufficient ground for denial of the requested writ.

B. A Number Of Circuits Have Not Addressed The Issue Advanced By Petitioner.

Respondents suggest that the time for consideration of the issue advanced by petitioner is not appropriate since a number of circuits have not addressed the issue. In fact, one can argue that a consensus is emerging which, if given time, could either assist this Court greatly in the ultimate resolution of the issue presented, or may make unnecessary this Court's consideration of this issue at all.

The Third Circuit has taken the position that separate incorporation of the parent and the subsidiary is sufficient to fulfill the plurality of actors requirement of Section 1. The Third Circuit has not considered the question since 1978, however. *See Columbia Metal Culvert Co., Inc.* v. *Kaiser Aluminum & Chemical Corp.*, 579 F. 2d 20 (3d Cir.), *cert. denied*, 439 U. S. 876 (1978). Since the time of that decision and before, the position taken by the Third Circuit has been extensively criticized. Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 Cardozo L. Rev. 23 (1981); Handler, *Twenty-Five Years of Antitrust*, 73 Colum. L. Rev. 415 (1973); Handler, *Through the Antitrust Looking Glass—Twenty-First Annual Antitrust Review*, 57 Calif. L. Rev. 182 (1969); Handler, *Some Misadventures in Antitrust Policymaking—Nineteenth Annual Review*, 76 Yale L. J. 92, 119 (1966); McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 Va. L. Rev. 183 (1955); Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N. Y. U. L. Rev. 20 (1968); Note, *"Conspiring Entities" Under Section 1 of the Sherman Act*, 95 Harv. L. Rev. 661 (1982); Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard*, 75 Mich. L. Rev. 717 (1977). The Third Circuit is the only circuit which has taken the position which petitioner would have this Court endorse.

Since the Third Circuit opinion in the *Columbia Metal Culvert Co., Inc.* case, the circuit courts that have addressed the issue have taken decidedly the opposite view. The Ninth Circuit has had numerous opportunities to address the plurality of actors-single economic entity argument since 1976, and has consistently taken the position which it took in the instant case. *See Hunt-Wesson Foods, Inc.* v. *Ragu Foods, Inc.*, 627 F. 2d 919, 927 n. 5 (9th Cir. 1980), *cert. denied*, ____ U. S. ____ (101 S. Ct. 1389) (1981); *Las Vegas Sun, Inc.* v. *Summa Corp.*, 610 F. 2d 614 (9th Cir. 1979), *cert. denied*, 447 U. S. 906 (1980); *Harvey* v. *Fearless Farris Wholesale, Inc.*, 589 F. 2d 451 (9th Cir. 1979); *Mutual Fund Investors, Inc.* v. *Putnam Management Co., Inc.* 553 F. 2d 620, 625-26 (9th Cir. 1977); *Knutson* v. *Daily Review, Inc.*, 548 F. 2d 795 (9th Cir.), *cert. denied*, 433 U. S. 910 (1976). In *Hunt-Wesson Foods, Inc.*, the Court summarized the Ninth Circuit's position as follows: "[i]n general, affiliated corporations cannot conspire with each other where they function as a single economic unit." 627 F. 2d at 927 n. 5.

The Seventh and the Eighth Circuits have each recently followed the lead of the Ninth Circuit. In *Photovest Corp.* v. *Fotomat Corp.*, 606 F. 2d 704, 726 (7th Cir. 1979) *cert. denied* 445 U. S. 917 (1980), the Seventh Circuit cited the Ninth Circuit *Knutson* case for the proposition that "[s]eparate incorporation, . . . albeit an important factor, is not conclusive proof of the requisite two actors for a § 1 conspiracy." The Court went on to find that two separately incorporated entities, defendant Fotomat Corp. and its wholly-owned subsidiary Fotomat Labs, Inc., were, for antitrust purposes, really one entity and thus could not have conspired in violation of Section 1. 606 F. 2d at 727.[4]

[4] The *Photovest Corp.* opinion supports the thesis that a consensus is emerging on the plurality of actors-single economic entity issue, since the Seventh Circuit had earlier approached the issue quite differently in *Tamaron Distributing Corp.* v. *Weiner*, 418 F. 2d 137 (7th Cir. 1969). Because of a factual framework which fit within the confines of the plurality of actors-single economic entity theory, the

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The Eighth Circuit, in another case involving the Fotomat companies, came to the same conclusion as the Seventh Circuit in finding that Fotomat Corp. and Fotomat Labs, Inc. constituted a single economic entity. That Court said:

> We agree with the Seventh and Ninth Circuits that the Supreme Court has not foreclosed a single enterprise defense to section 1 liability for related, although separately incorporated, companies. We believe a holding that the formality of separate incorporation forecloses such a defense elevates form over substance in a manner inconsistent with the intent of the antitrust laws. 641 F. 2d at 588.

Thus, it is apparent that those circuits which have recently considered the single economic entity defense to the plurality of actors requirement of Section 1 of the Sherman Act have found it to be persuasive, possibly leading to an emerging consensus.

In addition, the remaining eight circuits have not spoken directly to the issue, leading to the conclusion that this Court should wait until the composite analysis of the circuit courts is less amorphous.

Although the Fifth Circuit has been identified by petitioner Murray, as well as by some commentators, as having taken the position advanced by the Third Circuit, respondents believe that any such analysis is premature. In *H&B Equipment Co., Inc.* v. *International Harvester Co.*, 577 F. 2d 239 (5th Cir. 1978), the Fifth Circuit most recently addressed the subject. In *H&B Equipment Co., Inc.*, the Fifth Circuit held that defendant International Harvester (IH) could be found to have conspired with its wholly-owned subsidiary Harco Leasing Co. (Harco) in violation of Section 1 of the Sherman Act. There is no

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impact of the *Tamaron Distributing Corp.* case would have been very much in question even had the *Photovest Corp.* opinion not been subsequently decided. Nevertheless, a review of the two opinions reveals that the approach of the Seventh Circuit has changed dramatically from 1969 to 1979.

indication in the opinion, however, that IH and Harco could conspire simply because they were separately incorporated. Rather, the Court stated that Harco "appears to be a competitor" of the IH company store in Houston (577 F. 2d at 244), thereby precluding a claim that IH and Harco constitute a single economic entity. *See* discussion *supra* p. 4. Hence, a finding that IH and Harco were potential conspirators, given their status as competitors, is perfectly in accord with the single economic entity theory advanced by the Seventh, Eighth, and Ninth Circuits, and by respondents herein.

Petitioner relies on the statement in *H&B Equipment Co.* that:

> Having availed itself of separate incorporation for Harco, International Harvester market it off as a distinct entity, and the antitrust laws treat it as such. 577 F. 2d at 245.

Respondents suggest that that quotation is simply a reaffirmation of the well-recognized doctrine that a conspiracy requires the participation of two legal persons, and that divisions of a single corporation are incapable of fulfilling the plurality of actors requirements. *See Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F. 2d 71, 82 (9th Cir. 1969), *cert. denied*, 396 U. S. 1062 (1970). Respondents suggest that the quotation simply does not stand for the proposition that the fact of separate incorporation automatically renders two corporations capable of fulfilling the plurality of actors requirement of Section 1 of the Sherman Act. Hence, respondents believe that the Fifth Circuit has not addressed the issue which petitioner would have this Court consider.[5]

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[5] Nor does *Battle* v. *Liberty Nat. Life Ins. Co.*, 493 F. 2d 39 (5th Cir. 1974), *cert. denied*, 419 U. S. 1110 (1975) lead to a different conclusion. In that case, the Court determined that the separately incorporated entities did not constitute a single economic entity because they were "operationally two separate organizations," irrespective of the fact that they did not compete. 493 F. 2d at 44.

Petitioner Murray has identified the First Circuit as one which took the position of the Third, relying upon the following quoted statement:

> While the doctrine recognizing what we might call 'thin' conspiracies among corporations associated in one business has not been free of criticism, it seems alive and well.

George R. Whitten, Jr., Inc. v. *Paddock Pool Builders, Inc.*, 508 F. 2d 547, 557 (1st Cir. 1974), *cert. denied*, 421 U. S. 1004 (1975). *Petitioner Brief*, p. 12, n. Even a cursory analysis, however, discloses that the quoted statement is dictum. In addition, the *George R. Whitten* opinion was published in 1974—well before the recent analysis of the single economic entity concept came to pass. It is folly to argue that that case constitutes a position of the First Circuit.

In citing *GTE Service Corp.* v. *FCC*, 474 F. 2d 724 (2d Cir. 1973), petitioner also places the Second Circuit in line with the Third (*Petitioner Brief*, p. 12), but makes the same analytical error made in his discussion of the *H&B Equipment Co.* case. The discussion in *GTE Service Corp.* merely affirms that two legal persons, as opposed to divisions of the same corporation, are necessary to come within the plurality of actors requirement of Section 1 of the Sherman Act. 474 F. 2d at 733, n. 14. Further, like the *George R. Whitten* case, the opinion was issued well before the emergence of the recent analysis of the single economic entity theory. It is beyond dispute that the remaining circuits have not addressed the issue in any way.

Thus, respondents contend that the alleged conflict among the circuits is more accurately described as an aberration by the Third Circuit among the circuits that have addressed the issue. Respondents TMS and TMD suggest that any review of this issue by this Court should not occur until some time has passed to allow the First, Second, Fourth, Fifth, Sixth, Tenth, Eleventh and D. C. Circuits to address the issue, and contribute to what respondents contend is the emerging consensus.

3. THE SINGLE ECONOMIC ENTITY RULE ENDORSED BY THE NINTH CIRCUIT ESTABLISHES MEANINGFUL PARAMETERS FOR THE CONSPIRACY ELEMENT OF ALLEGED VIOLATIONS OF SECTION 1 OF THE SHERMAN ACT.

Petitioner Murray argues that the plurality of actors —single economic entity rule adopted by the Ninth Circuit undermines the effective enforcement of the antitrust laws. *Petitioner Brief*, p. 12. Petitioner suggests that an appropriate and simple rule to adopt is that separately incorporated entities may, as a matter of law, fulfill the plurality of actors requirement of Section 1 of the Sherman Act. Respondents submit, however, that the rule which petitioner would adopt ignores the intended purpose of Section 1 of the Sherman Act. Section 1 of the Sherman Act proscribes every contract combination or conspiracy in restraint of trade or commerce. Thus, Section 1 regulates restraints on economic activity (trade or commerce) engaged in by a plurality of actors (contract, combination or conspiracy). Petitioner argues, in effect, that the plurality of actors requirement is unrelated to the restraint of economic activity requirement, an argument which ignores the purposeful distinction between Section 1 and Section 2 of the Sherman Act. As was stated in *Ogilvie* v. *Fotomat Corp.*, 641 F. 2d 581, 588-89 (8th Cir. 1981):

> Congress has distinguished courses of conduct which are illegal when undertaken by a plurality of actors from those which are illegal when undertaken by a single entity. Compare section 1 of the Sherman Act, 15 U.S.C. § 1 (1976) with section 2 of the Sherman Act, 15 U.S.C. § 2 (1976) [citations omitted]. *To impose section 1 liability on what in reality constitutes a single economic enterprise would imprudently blur this purposeful distinction.*

As was recently stated by a respected commentator, the policy consideration for treating an action effected by agree-

ment between two competitors differently from the identical action by a single firm is the desire to maintain and encourage as many independent centers of initiative and decision making as possible. Where the action taken is by two corporations which constitute a single decisionmaking entity, application of section 1 liability will not advance this policy goal. *See* Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine,* 3 Cardozo L. Rev. 23, 72-3 (1981).[6]

As the Court stated in the *H&B Equipment Co.* case in discussing the statutory framework of § 1, "[t]he assumption behind the statutory scheme is that anticompetitive conduct by firms lacking monopoly power threatens the sound operation of a free economy only when done in concert with others." 577 F. 2d at 243.

Respondents submit that the rule adopted by the Ninth Circuit respects the distinction between violations of Section 1 of the Sherman Act and violations of those statutes, like Section 2 of the Sherman Act, which proscribe single-firm anticompetitive activity.

Petitioner argues that elimination of the plurality of actors-single economic entity rule would avoid "the lengthy fact finding mission otherwise necessary to determine whether the

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[6] *See* also, Note, "Conspiring Entities" Under Section 1 of the Sherman Act, 95 Harv. L. Rev. 661, 667-68 (1982), which stated:

> Nor is a rule that separate incorporation suffices to make related corporations possible conspirators under section 1 consistent with the general goals of antitrust policy. A firm will select the organizational form that enables it to operate most efficiently, and there are legitimate business reasons for preferring the subsidiary form of organization. Potential section 1 liability, however, will artificially discourage operation through subsidiaries. Because the antitrust laws aim to promote economic efficiency and because no court has suggested that operation through subsidiaries itself threatens competition, it is inconsistent with antitrust goals to make section 1 liability turn on the firm's choice of organizational form.

corporations are working together as part of a single economic enterprise." *Petitioner Brief*, p. 14. Petitioner fails to point out that the effect of the elimination of the plurality of actors-single economic entity rule would be to read out of Section 1 any meaningful contract, combination or conspiracy requirement—a requisite of Section 1 by the very terms of the statute since its passage in 1890.

Since 1976, the Ninth Circuit has decided a number of cases in which the plurality of actors—single economic entity question was at issue. Over the course of those decisions, the Ninth Circuit has fashioned a reasoned approach to the issue, which honors the historical distinction between Section 1 conspiracies and Section 2 single-firm conduct. In *Knutson* v. *Daily Review, Inc.*, 548 F. 2d 795 (9th Cir.) *cert. denied*, 433 U. S. 910 (1976), the defendants consisted of a newspaper publishing company, its wholly-owned subsidiary publishing company, and certain officers and employees. The plaintiffs, independent newspaper distributors that had been doing business with the defendants, alleged that in converting the independent newspaper distribution system to an employee-distribution system, defendants had conspired in violation of Section 1. In discussing whether an agreement between the publishing company and its wholly-owned subsidiary could satisfy the "contract, combination or conspiracy" requirement of Section 1, the Court noted that:

> Antitrust law is concerned with the concerted action of distinct economic entities .... Separate incorporation is just one among many factors; it may be significant in an antitrust sense or it may be only a technicality, a by-product of decisions with no antitrust impact. 548 F. 2d at 802.

The Ninth Circuit continued its analysis of this issue in *Harvey* v. *Fearless Farris Wholesale, Inc.*, 589 F. 2d 451 (9th Cir. 1979). In that case, the Ninth Circuit articulated the basic

requirement of a contract, combination, or conspiracy as follows:

> It is fundamental that *a single* person or *economic entity cannot combine or conspire* in isolation: there must be concerted action by a plurality of actors. 589 F. 2d at 455. (emphasis added).

Because the separate corporations sued in *Harvey* were subject to the management and control of common individuals, officers and employees, they were incapable of contracting, combining or conspiring as required by Section 1.

In *Las Vegas Sun, Inc.* v. *Summa Corp.*, 610 F. 2d 614 (9th Cir. 1979), *cert. denied*, 447 U. S. 906 (1980), the Ninth Circuit affirmed a lower court decision that three related, corporate defendants, each of which had been owned or controlled by Howard R. Hughes, Jr., were incapable of conspiring in violation of Section 1 of the Sherman Act. The defendant corporation in *Summa* held title to six hotel-casino resorts operated as divisions by one corporate defendant. The corporate defendants apparently did not compete among themselves, and the hotel-resorts neither competed nor were they separately incorporated. The court of appeals noted that "[t]o conspire within the meaning of the Sherman Act, corporate entities within a single organization must be sufficiently independent of each other for this concerted action to raise antitrust concerns." *Id.* at 617.

In *Hunt-Wesson Foods, Inc.* v. *Ragu Foods, Inc.*, 627 F. 2d 919 (9th Cir. 1980), *cert. denied*, ____ U. S. ____ (101 S. Ct. 1389) (1981), the Ninth Circuit reversed summary judgment granted in favor of the plaintiffs on a claim that the defendant subsidiary corporation had conspired with its parent, also a defendant, to restrain trade in violation of Section 1. At oral argument, apparently for the first time, the defendant subsidiary contended that it was incapable of conspiring with its parent within the meaning of Section 1. Reasoning that the question depended on "the particular facts involved, such as

unity of control and the existence of real or apparent competition between the related corporation," (Id.), the court of appeals declined to resolve the issue on appeal and remanded that question for further proceedings.

Most recently, in *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co., Inc.* 652 F. 2d 917 (9th Cir. 1981), the Ninth Circuit affirmed that whether or not a wholesale baker was a separate entity from its parent holding company for antitrust purposes was a substantial issue of material fact. The Court re-affirmed that the mere formality of separate incorporation is not, without more, sufficient to provide the capacity for conspiracy, but rather that the finder of fact should determine whether the corporations have "antitrust significance as separate economic units." 652 F. 2d at 958.

Thus, it is apparent that the Ninth Circuit has consistently advanced the plurality of actors-single economic entity test in a variety of factual settings.[7]

Petitioner erroneously represents to this Court that the Ninth Circuit has given no indication as to what factors should be considered by a finder of fact in determining whether related corporations have antitrust significance. *Petitioner Brief*, p. 15. In fact, the Ninth Circuit has developed an extensive list of factors which it determines the trier of fact should review in making its findings.

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[7] Petitioner relies upon an out-of-context quotation from *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F. 2d 71 (9th Cir. 1969), *cert. denied*, 396 U. S. 1062 (1970) in support of the proposition that the Ninth Circuit at one time supported the thesis which petitioner advances here. *Petitioner Brief*, pp. 12-13. Respondents contend that the quotation relied upon should not be given, and never has been given, the construction which petitioner advances. Nevertheless, it is clear that even if the Ninth Circuit at one time gave *Hawaiian Oke* the construction advanced by plaintiff, it has been tacitly overruled by *Knutson* and its progeny.

In *Knutson,* the Court isolated several factors which it found to be controlling in its determination that defendants constituted a single economic entity incapable of conspiracy. The Court found that: (1) the defendants formed a single unified structure; (2) the relationship between the entities consisted of more than the "mere ownership of the subsidiary's stock;" (3) the entities were, in reality a single business unit "separated only by the technicality of separate incorporation;" (4) the entities were subject to the management and control of common individuals, officers and employees; and (5) the entities did not compete or hold themselves out as competitors. In the *Harvey, Las Vegas Sun, Inc.* and *Hunt-Wesson Foods, Inc.* cases, the Ninth Circuit affirmed the importance of certain factors articulated in *Knutson* such as whether or not the related entities are subject to the management and control of common individuals, officers and employees and whether or not the related entities compete or appear to compete.

In the *William Inglis & Sons Baking Co.* case, the Ninth Circuit expanded upon the factors which the trier of fact should review in determining whether separate entities have antitrust significance. The Ninth Circuit stated that it was important to determine whether (1) it was a situation in which concerted activity by a parent and its subsidiary would restrain trade between the two, or between the subsidiary and another subsidiary in the same family engaged in the same or a related line of business; (2) the case involved vertically related operating companies, such as a manufacturer and distributor, a wholesaler and retailer, or a supplier and purchaser, in which the power of one is used to restrain trade between the other and its competitors; (3) the pricing decisions of the subsidiary were independent of the direction of the parent; and (4) whether the subsidiary was given considerable operating autonomy. 652 F. 2d at 959. To the extent that the facts of a given case answer the *William Inglis* questions in the negative, the trier of fact is lead to the conclusion that related corporations constitute a single economic entity.

Thus a review of the Ninth Circuit decisions from *Knutson* through *William Inglis & Sons Baking Co.* reveals that a comprehensive list of factors has been developed to assist lower courts and juries in determining whether related corporations constitute a single economic entity, despite petitioner's claim to the contrary.

In sum, petitioner argues that a standard which relies on the form of separate incorporation rather than the substance of economic relationships, and which would establish the requisite plurality of actors from the mere fact of separate incorporation, would be simpler. With that proposition, respondents cannot disagree. Respondents respectfully suggest, however, that to establish such a standard would be to ignore the historical and conceptual framework of Section 1 of the Sherman Act. *See* pp. 16-18 *supra*. Declining to do so, the Ninth Circuit has established a workable, necessary method for determining whether the plurality of actors requirement of Section 1 is fulfilled.

CONCLUSION

WHEREFORE, the respondents respectfully suggest that the Petition for a Writ of Certiorari be denied for the following reasons:

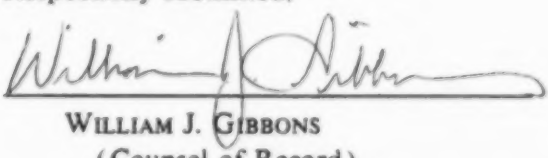
1. the decision appealed from is in harmony with previous pronouncements of this Court;

2. this Court's consideration of the issue would be premature since the Ninth Circuit has vacated and remanded to the district court the issue of whether or not TMS and TMD are in fact a single economic entity;

3. the conflict among the circuits has not ripened since a number of circuits have not yet addressed the issue, leaving open the possibility of an emerging consensus; and

4. the Ninth Circuit's series of decisions on the issue have provided a workable, effective formula whereby Section 1 of the Sherman Act is given its intended effect.

Respectfully submitted,



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